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SUPREME COURT OF THE UNITED STATES

October Term,
No. 465.

Joab H. Banton, as District Attorney of the County of New York, State of New York, and Transit Commission, State of New York,
Appellants,
against
Belt Line Railway Corporation.

REPLY BRIEF FOR APPELLANT BANTON.

Statement.

There is no occasion for taking the time of the Court by making a statement. We proceed to reply to the points in answer to appellant Banton's brief.

POINT I.

There is nothing in the record to justify the assertion that the loss as indicated by the computation of the Court below on the transfer traffic was greater than $4,000 for the fiscal year ending June 30, 1922.

(*Replying to Appellee's Point VI*)

I.

The point made is that the Court did not find a loss limited to $4,000 per annum on the trans-

fer traffic but that it made this finding "without reference to a *possible* loss of revenue arising from the fact that *numerous* passengers who now pay 5 cents per ride on the 59th Street line, would, if transfers are restored, pay into the treasury of complainant but two cents per ride" (italics ours). [R. p. 119].

This point involves the question what would have been the results during the fiscal year ending June 30th, 1922, if the transfer order had been in effect? The Court's conclusion was that there would have been a 12½% increase in traffic with an additional gross revenue of $42,000 as against a 10 per cent increase in expenses or a total additional cost of $46,000; or a decrease in net revenue of $4,000 [R. p. 119].

Neither the Master nor the Court below found, nor does the record show what the "possible" loss would be nor how many the "numerous" five-cent passengers would be; nor, does the record anywhere show that there would be any such loss of revenue. Nor does appellee give any reference to the testimony in support of this assertion.

Appellee shows [Brief, p. 76] that in the fiscal year 1922 there was an increase of 499,434 five-cent passengers compared with the preceding fiscal year, 1921. He assumes that all of the additional five-cent passengers would have been transfer riders (yielding 2¢ each to the appellee), had the Commission's transfer order been in effect. It is further assumed 499,434 new five-cent passengers came from the two-cent group of the previous year. In support of this contention, appellee quotes the Master [Brief, p. 77] to the effect that these passengers had

"their accustomed N. or S. route with crossover on 59th Street, and were satisfied to pay the additional five cents rather than take the trouble to find some new route. It is difficult to see where else they could have come from. There is no suggestion of any regional conditions tending to increase travel on the 59th Street line, a ride beginning and ending on that line. General increase of population will not account for it." Appellee does not add the last sentence which reads: "The advance estimates of the current census indicate that while the other boroughs have materially increased in population since the last one, Manhattan has remained substantially unchanged."

Appellee then proceeds to show that a loss of three cents on these five-cent passengers would amount to $14,983.02.

It is submitted that there is nothing in the record to justify the assertion of the Master above quoted. Neither the Master nor appellee bring to the support of these conjectures any reference to the testimony. There is none to be found.

As a mere supposition made *outside of the Record*, there is no reasonable justification. The Master assumes the bulk of the five-cent passengers referred to would rather go through the inconvenience of traveling on the surface lines and paying an additional five-cent fare than find some more direct and less expensive route. The Master finds it difficult to see where these passengers could have come from other than from former transfer passengers, ignoring completely the tremendous growth of business and other activities in the mid-section of Man-

hattan. He states that the general increase in population would not account for it wholly, assuming that the riding on the 59th Street Crosstown line comes exclusively from residents of Manhattan, and completely ignoring the fact of common knowledge that hundreds of thousands daily pour in from the outside Metropolitan district, an addition to the several hundred thousand daily visitors from other parts of the country that flow into and through the territory served by the 59th Street line.

All these things of common knowledge, outside the record, the Master ignored, but did take the pains to examine and compare the past census of population for *Manhattan, as a whole*, in order to show that the additional passengers could not possibly be attributed to increase in the population.

The only reasonable conclusion is that the increase of five-cent passengers in 1922 was due to the normal traffic growth of the 59th Street line. While the total number of 499,434 is large when compared with the total number of the previous year, it amounts to an increase of only six and five-tenths per cent. (6.5%) on the 7,605,441 five-cent passengers of the year before [R. pp. 430-433]. This is only a moderate increase, and conforms entirely with what is to be reasonably expected from the rapid business developments in that particular section.

The record shows (Exhibits DH, DI, DJ, DK and DL) the five-cent passengers for the fiscal years, 1921 and 1922, for the Third Avenue line, the Lexington Avenue line, the Second Avenue line, the Broadway line and the Tenth Avenue line, for which the increase in 1922 over 1921 was respectively as follows:

FIVE CENT FARES

	Year ended June 30 1922	1921	Increase %
59th Street (Belt Line)	8,100,633	7,605,441	6.5
Third Avenue.....	39,805,674	37,340,673	6.6
Lexington Avenue....	27,738,687	27,014,119	2.7
Second Avenue.....	9,697,617	9,232,448	5.0
Broadway Branch (42d St. M. & St. Nich.)..	22,253,688	19,955,066	11.5
Tenth Avenue (42d St. M. & St. Nich.).....	5,979,999	5,703,010	4.9

[R. pp. 430-433, 434-435, 436-437, 438-439, 440-443, 444-445.]

The lack of increase in population in Manhattan as a whole, according to the census, did not prevent these lines from attaining their substantial increases for 1922, as against 1921.

II.

Appellee makes the point that there was no allowance for depreciation in the computation showing a loss of $4,000 for the fiscal year, 1922, on the transfer traffic (Brief, p. 77). *The appellee did not prove any operating expense for depreciation.*

Plaintiff's Exhibit J, attached to the complaint (R. p. 46) shows depreciation charges for part of the year 1913, and for the years 1914, 1915 and 1916, and shows no depreciation charges subsequently up to and including the year 1920. Exhibit B H, which was a compilation of statements of income from July 1, 1920, to September 30, 1922, to the Commissions, shows a depreciation charge of $47,192.55 for the year ended June

30, 1922, *but none whatsoever for the year ended June 30, 1921* (R. p. 336).

An examination of Exhibits J and B H shows that the Company did not have a regular and systematic method of making a charge for depreciation for each year. Since there is no depreciation charged for five years prior to 1922, the fact is that the charge of $47,192 in 1922 was not properly applicable to that year.

There is not a word of proof in the record supporting this or any other charge for depreciation for the fiscal year ended June 30, 1922, or for other years when charges were made or not made.

We recognize that in a statement of operating expense for the purpose of determining reasonable rates, provision should be made for depreciation, but any such inclusions should be established by competent proof. Likewise, proof should be offered to show that the item of maintenance does not include elements properly taken care of by depreciation, as, for example, the renewals and replacements of property.

It is true that the appellee set up on the books a charge for depreciation in the year 1922, although a similar charge was not made for the previous five years. Exhibit B H (R. p. 336) is in evidence as a statement of the book figures and not in proof of the facts therein contained. Appellee's witness Farrington testified upon its receipt in evidence that

> "to the extent this is actual book figures as here we have included interest earnings and also the depreciation, where it was set up. Otherwise it is the same" (*referring to the three previous exhibits BE, BF and BG*

found at pp. 330, 332, 334, which exhibits did not contain any charge for depreciation) (R. p. 149).

Certainly such a statement by the witness of what the books carry for depreciation for the fiscal year ending June 30, 1922, is no proof of the depreciation for that year.

It is to be noted that Farrington was the acting auditor prior to which he had been assistant auditor. The appellee did not attempt to prove by this witness, because of lack of qualification, the actuality of the depreciation charge. Exhibit BH purported to be a resume of Exhibits BE, BF and BG, none of which included depreciation charges [R. p. 149]. But BH included interest charges and depreciation, as shown on the books. Reference to Q. 107 and Answer [R. p. 149] shows that counsel sought a reply that all of the charges were correct (whether as a statement of what appears on the books or as an actual fact is not clear) but the witness would only vouch for the correctness of the transcription from the books. This is certainly not proof of the estimate of depreciation for the year in question.

III.

Appellee proceeds to show a still further imaginary loss by urging that the 21% increase in transfer traffic would mean a 21% increase in operating expenses, instead of 10%, as computed by the Court (Brief, page 80). That a 21% increase in transfer traffic would mean a 21% increase in operating expenses is stated to be based *on undisputed evidence*. The fact is otherwise.

Appellee's witness Farrington first testified

that he "did not say that the expenses of operation varied substantially with the number of passengers carried. I testified that expenses increased in the same proportion as car mileage" (R. p. 172). The next question elicited the response that "if there is any appreciable number of passengers carried, why no, that is the mileage will be increased," and then replied to the effect that the mileage will be increased practically in precisely the same proporton as the increase in the number of passengers. In other words, the witness himself first testifies that expenses of operation did not vary substantially with the number of passengers carried but increased in the same proportion as car mileage, and immediately thereafter takes refuge behind the statement that the increased car mileage varies with the increased number of passengers.

The testimony of appellee's witness Thompson contradicts that of Farrington (R. p. 144). Thompson testified that with the decrease in the number of passengers there had been no decrease in car mileage.

It may be true that a service taxed to its capacity may require additional car mileage, while an already heavily burdened service reduced in passengers may justify the continuation of the old car mileage, but the testimony by appellant's witness Smith was (R. p. 250) that there was sufficient car mileage during the *non-rush hours* and that a 10% increase in car mileage *could* be used during the *rush hours.*

Appellee (Brief, p. 30) creates the impression that the present service is inadequate and requires an increase of 10% car mileage, wholly ignoring the uncontradicted testimony of Smith

that no additional car mileage was required during the non-rush hours.

Even assuming that there is a direct relation between increased car mileage and increased traffic, it does not follow that increased expenses go along in the same proportion. It is common knowledge that expenses do not vary directly with car mileage. There are costs, for instance, taxes, etc., which are practically constant. *In fact appellee's own witness Thompson so testified* (R. p. 147).

IV.

Summary.

First, there is no substance in the point that there would be an additional loss by reason of a number of existing five-cent passengers becoming transfer passengers (yielding two cents to appellee).

Second, that no allowance was made for depreciation.

Third, that an increase in *passengers* of 21% would mean an increase *expense* of 21%; assuming that a 21% increase in *passengers* would mean a 21% increase in *car mileage*, it does not follow that there would be an increased *expense* of 21%. To the contrary, appellee's own witness testified that *total operating expenses* do not increase in proportion to increase in *passengers*..

POINT II.

There was available for return for the year ending June 30, 1922, the sum of $161,200.

(In Reply to Appellee's Point VII)

Appellee here merely computes what would be the additional loss on the transfer traffic, and its effect on the total operations with a view to showing no return available. The computations are based on the three wholly unfounded assumptions dealt with in appellee's Point VI and are treated in the preceding point herein. The assumptions falling, the imaginary figures go with them. At most, the loss for the fiscal year ending June 30th, 1922, on the transfer traffic would have been $4,000, as found by the Court, which deducted from the revenue $165,200 found by the Master gives the return of $161,200.

POINT III.

The valuation of the Belt Line Corporation's property found by the Master and not disturbed by the Court was improper, both as to the corporation's entire property and even more so as to the 59th St. Crosstown Line of appellee.

(In Answer to Appellee's Brief, Point VIII)

I.

The point is made (Brief, p. 84) that neither counsel for appellants saw fit to introduce figures

relative to the alleged property of appellee on bases other than the reproduction cost new as of June 30, 1921, although said figures were available to the appellants.

We need not here go to any length in reiterating the point that the burden of proof is upon the appellee. However, Madden's appraisals on the respective bases contained property not used at all by the 59th Street line (not contradicted by appellee), as well as property jointly used by the 59th Street line and other companies (Banton's brief, pp. 19, 20, uncontradicted by appellee, and Madden's testimony, Record, p. 194, fols. 338, 339). Certainly appellees were not required to offer appraisals on original cost on the 1910-14 basis contained in Exhibit B-S based on improper inventory.

Assuming that the inventory on which the respective appraisals were computed were correct, and that two of the bases not offered by appellee were available and might have been offered by the appellants has force, there can be no justification for the argument that they should have been offered by appellants where the inventory underlying them was claimed to be incorrect, and in fact shown to be improper, with relation to the 59th Street line.

II.

The contention that the "original cost" was $2,557,091.53, which was the amount of the securities issued in 1912 and 1915, is unique as a conception of the original cost of the properties now used and useful; there having been an abandonment of 19 miles of track [R. p. 182] *only*

3.159 miles remaining [R. p. 180] *as well as disuse of other property* [Banton Brief, Point IV]. *The East Belt Line was abandoned in 1919; the West Belt Line was abandoned in 1921* (R. p. 106). These facts are not disputed by appellee. The Master found it quite persuasive evidence of the *market value at the time of sale* but the figure of $1,673,000 (R. p. 105), which was the total purchase price at the foreclosure is no indication whatsoever of market value or any other value *of existing property* at the time of the trial.

The price brought at a foreclosure sale and the total amount of securities issued under commission regulation may be some evidence of *the original cost of the original property.* It has no relation whatsoever to the original cost of existing property devoted to the service.

Appellee says [Brief, p. 85] "if original cost were to be discussed as the basis of valuation, it makes no difference that the Belt Line Company has, in order to continue to operate the remainder of its street railroad, abandoned part of its line because *its investment still remains,* and it has not earned enough to amortize or write off the capital loss *caused by the abandonment.*" No authority is cited in its support. The oft-repeated rule allowing a utility a return on the property used and useful, precludes a return on property not used and long since abandoned.

Further, there is not a scintilla of evidence justifying the statement that the company did not earn enough to amortize or write off its capital loss caused by the abandonment on the East and West Belt Lines and other property. The statement so far as the record is concerned is

pure fiction. But even if that were the fact, the failure of the company to amortize the abandoned part of its property which was in service for many years is no justification for continuing to burden the present users with a return on property out of existence. (See Knoxville v. Knoxville, 212 U. S. 1, 14.)

III.

(a) As to reproduction cost new as of June 30, 1921, testified to by Madden, appellee makes the point that Madden's figure (which will be next discussed), did not include any real estate.

The fact is that Madden's figure of $2,859,755 covered all of appellee's property, and the Master in taking Madden's reproduction figure as of June 30, 1921, took it to include land (R. p. 109). The Master says (R. p. 109):

> The Master: "As the record of the testimony stands, it would seem clear that the value of the land ($531,000) should be added to this. The Master, however, is inclined to believe that the witness Madden's reiteration of the statement that the valuation of the land was not included in his valuation means merely that he did not himself go into the question of valuation of real estate, but accepted the figures of Mr. Ruland and that the figures of Ruland's valuation appear in Madden's total of $2,600,000 to which it has been here reduced.
>
> If the mere inclusion of Ruland's figures in this amount of $2,600,000 or their addition to it at all affected the final conclusion on the crucial question before the Master he would re-open the cause and have the obscurity removed. * * *"

The Master with a full knowledge of the testimony, and having heard the witness testify, determined this point and found that the land value was included in Madden's figures.

However, if it should seem that the Record is obscure on this point, then the appellee is certainly not entitled to receive the benefit of an additional $531,000, which was not clearly shown.

The complainant, here the appellee, must prove its case and cannot take to itself the benefit of any doubt or obscurity, and especially so under the rule laid down by this Court and treated in appellant Banton's Brief, Point I, "The invalidating facts must be proved to the satisfaction of the Court beyond a reasonable doubt."

(b) It is to be noted in connection with Madden's reproduction cost figures of June 30, 1921, that the appellee gives it at $2,504,478.60 (Brief, p. 86). This figure results from a deduction of 10% representing the difference between the reproduction figure of Madden at the time he made the appraisal, and the date of trial (Brief, p. 16).

Thus, appellee itself concedes a shrinkage of $278,275 between the two dates. This shrinkage in valuation, however, was completely ignored by the Master in finding the reproduction cost new at the conclusion of the case. The Master takes the figure of $2,859,754 (R. p. 109) instead of the figure conceded by appellee of $2,504,478.60. *On a 6% basis the difference in revenue required annually to give a return on the excess amount would be over $16,750.*

IV.

Appellee argues (Brief, p. 87) that if the appellants were dissatisfied with what it terms "Madden's estimate of depreciation," the appellants were at liberty to introduce evidence thereon, and that the fact that the appellants did not see fit to call any witness upon the subject is significant of the fact that Madden's estimate was entirely proper.

Even if Madden had testified on the subject of what properly constituted depreciation the appellants would have been under no duty to meet it with their own estimate of depreciation. The burden of properly showing depreciation is squarely on the shoulders of the appellee and cannot be shifted. Appellee delights to term a deduction for conditioning the property "deprecation." *Madden testified to no figures for depreciation of appellee's property. His testimony was entirely confined to testimony of the cost of conditioning new to place the property in first class operating condition, which he placed at $138,248.*

As pointed out in Point V of Banton's Brief (p. 21), the accrued depreciation on the straight line basis of track and structure and rolling stock alone as shown in Exhibit B S was $634,818. The depreciation on the part of the property alone was over five times as great as the deduction made by the Master under the characterization of depreciation.